STATE OF MICHIGAN

COURT OF APPEALS

HASTINGS MUTUAL INSURANCE COMPANY,

Plaintiff/Counter-Defendant-Appellant/Cross-Appellee,

v

MOSHER DOLAN CATALDO & KELLY, INC.,

Defendant/Counter-Plaintiff-Appellee/Cross-Appellant,

and

LISA FEINBLOOM and DAVID FEINBLOOM,

Defendants.

UNPUBLISHED
January 23, 2014

No. 296791
Oakland Circuit Court
LC No. 2004-056508-CK

ON REMAND

Before: SAAD, P.J., and K. F. KELLY and M.J. KELLY, JJ.

PER CURIAM.

In this insurance coverage dispute, this Court previously held that it was "bound by the law of the case to accept this Court's prior implicit determination that [various insurance policy exclusions] do not apply." *Hastings Mut Ins Co v Mosher, Dolan, Cataldo & Kelly, Inc*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2013 (Docket No. 296791), slip op at 8. In an order dated November 6, 2013, the Supreme Court vacated in part this Court's decision, finding that "[t]he Court of Appeals erred in concluding that it was bound by the law of the case to accept a prior panel's implicit determination that the policy exclusions do not apply. The prior panel did not make any implicit or explicit determination regarding the application of the policy exclusions." *Hastings Mut Ins Co v Mosher, Dolan Cataldo & Kelly, Inc*, ___ Mich ___; 838 NW2d 874 (Docket No. 146900, decided November 6, 2013). The Supreme Court remanded for "consideration of the issues: (1) which insurance policy or policies govern coverage in this case; and (2) whether any exclusions in the governing policy or policies apply," denying leave to appeal in all other respects. *Id.* After

consideration of the narrow issues remanded to us, we reverse the trial court's judgment for defendant Mosher Dolan Cataldo & Kelly, Inc. ("MDCK").

I. BACKGROUND AND PROCEDURAL HISTORY

This case has a complex procedural history. Essentially, plaintiff Hastings Mutual Insurance Company ("Hastings") issued defendant MDCK commercial general liability ("CGL") policies for the periods: (1) March 30, 2001, to March 30, 2002; (2) March 30, 2002, to March 30, 2003, and (3) March 30, 2003, to March 30, 2004. MDCK sought defense and indemnity coverage under the policies in relation to an arbitration proceeding brought by defendants Lisa and David Feinbloom against MDCK. The Feinblooms claimed that the custom home built by MDCK became infested with mold due to MDCK's negligent construction. The Feinblooms' claims for damages fell into two categories: (1) damages arising from the compromised physical structure of the house, and (2) damages arising from the loss of mold-infested personal property. In an interim ruling, the arbitrator rejected the Feinblooms' claim that demolition and reconstruction of the house was the only adequate remedy for the damaged structure, and instead ordered MDCK to pay for remediation of the defects. At this point, Hastings advised MDCK that Hastings would cease providing coverage for MDCK's defense costs. Hastings maintained that the policies did not provide coverage for defense of the Feinblooms' ongoing claims because the claims did not arise from an "occurrence" as defined in the CGL policies. According to Hastings, damage to MDCK's own work product (i.e., the constructed residence) was not an occurrence. Hastings averred that the arbitrator's decision not to award the Feinblooms damages for destruction of their personal property (furniture and other household contents) meant that the Feinblooms' surviving claims were not subject to liability coverage under the CGL policies.

Hastings brought an action for a declaratory judgment, seeking a determination that MDCK was not entitled to liability coverage for the Feinblooms' surviving claims. Oakland Circuit Court Judge Nanci Grant granted summary disposition for MDCK. In a prior appeal, this Court initially reversed the order of summary disposition for MDCK, *Hastings Mut Ins Co v Mosher, Dolan, Cataldo & Kelly, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2006 (Docket No. 265621) ("*Hastings I*"), but subsequently granted MDCK's motion for reconsideration and remanded the case to the trial court for further proceedings, *Hastings Mut Ins Co v Mosher, Dolan, Cataldo & Kelly, Inc (On Reconsideration)*, unpublished opinion per curiam of the Court of Appeals, issued May 18, 2006 (Docket No. 265621) ("*Hastings II*"). Specifically, in *Hastings II*, this Court held that any claim for damages to property other than MDCK's work-product, i.e., personal property, was arguably covered by the policy; therefore, Hastings continued to have a duty to defend until such time as the Feinblooms' claims were limited to only damages that fall outside the scope of the policies, i.e., MDCK's own work product. *Hastings II*, slip op at 8. Accordingly, this Court remanded for a determination of "what point in time, if any, plaintiff can confine the Feinblooms' claims against Mosher to those theories that the policy would not cover, and to determine the extent of plaintiff's liability for the cost of Mosher's defense until that point." *Id.*

On remand, Hastings moved for summary disposition under MCR 2.116(C)(10). Hastings argued that it had no duty to either defend or indemnify *any* of the Feinblooms' claims because each claim came within either a fungi exclusion endorsement in the 2003-2004 policy, or policy exclusions (m) (damage to impaired property or property not physically injured), or (n)

(recall of products, work, or impaired property). Hastings relied on its own policy language that there is no duty to defend if the insurance policy does not apply. The trial court disagreed and denied Hastings's summary disposition motion. The case proceeded to trial to determine the amount of MDCK's damages arising from Hastings's breach of the insurance policies. A jury returned a verdict in MDCK's favor and the trial court entered a judgment for MDCK in the amount of $746,048.72, plus pre-judgment and post-judgment interest.

In the appeal that followed, Hastings argued that coverage was entirely precluded pursuant to either the mold endorsement or other policy exclusions. However, we did not address the merits of these arguments, but instead concluded that "[b]y remanding to the trial court to determine the point in time at which the Feinblooms' claims became confined to nonoccurrences under the policy, this Court [in *Hasings II*] implicitly held that the duty to defend extended to the occurrence-based claims because they did not come within the policy exclusions." *Hastings Mut Ins Co v Mosher, Dolan, Cataldo & Kelly, Inc*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2013 (Docket No 296791) ("*Hastings III*"), slip op at 8.

As noted above, Hastings sought leave to appeal from our Supreme Court, which, in lieu of granting leave, vacated this Court's judgment in part and remanded the case to this Court "for consideration of the issues: (1) which insurance policy or policies govern coverage in this case; and (2) whether any exclusions in the governing policy or policies apply." *Hastings Mut Ins Co,* 838 NW2d 874. The Supreme Court stated:

> The Court of Appeals erred in concluding that it was bound by the law of the case to accept a prior panel's implicit determination that the policy exclusions do not apply. The prior panel did not make any implicit or explicit determination regarding the application of the policy exclusions. [*Id.*]

The Supreme Court denied leave to appeal in all other respects. *Id.*

II. STANDARD OF REVIEW

Issues concerning the interpretation of an insurance contract are reviewed de novo. *American Home Assurance Co v Mich Catastrophic Claims Ass'n*, 288 Mich App 706, 717; 795 NW2d 172 (2010). "The rules of contract interpretation apply to the interpretation of insurance contracts." *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010). "The language of insurance contracts should be read as a whole and must be construed to give effect to every word, clause, and phrase." *Id.* The reviewing court should read the language according to its plain and ordinary meaning, and avoid technical and strained constructions. *Radenbaugh v Farm Bureau Ins Co of Mich,* 240 Mich App 134, 138; 610 NW2d 272 (2000).

III. ANALYSIS

After review, we conclude that Hastings is entitled to judgment as a matter of law on the issue of duty to defend because the Feinblooms' claims for fungi damage are excluded from coverage. Moreover, Hastings has a right to restitution of benefits erroneously paid to MDCK.

"[I]n reviewing an insurance policy dispute we must look to the language of the insurance policy and interpret the terms therein in accordance with Michigan's well-established principles

of contract construction." *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007) (citation and internal quotations omitted). In *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353-354; 596 NW2d 190 (1999), our Supreme Court set forth these principles:

> First, an insurance contract must be enforced in accordance with its terms. A court must not hold an insurance company liable for a risk that it did not assume. Second, a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise. Thus, the terms of a contract must be enforced as written where there is no ambiguity.

With respect to insurance policy exclusions, this Court held in *Ile v Foremost Ins Co*, 293 Mich App 309, 316; 809 NW2d 617 (2011), rev'd on other grounds 493 Mich 915 (2012):

> Exclusionary clauses in insurance policies are strictly construed in favor of the insured. However, coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect. It is impossible to hold an insurance company liable for a risk it did not assume.

See also *Pugh v Zefi*, 294 Mich App 393, 396; 812 NW2d 789 (2011).

Regarding policy endorsements, this Court held in *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 27; 800 NW2d 93 (2010):

> "[E]ndorsements often are issued to specifically grant certain coverage or remove the effect of particular exclusions. Thus, such an endorsement will supersede the terms of the exclusion in question." 4 Holmes, Appleman on Insurance (2d ed), § 20.1, p 156. "When a conflict arises between the terms of an endorsement and the form provisions of an insurance contract, the terms of the endorsement prevail." *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369, 380; 460 NW2d 329 (1990).

The fungi exclusion appears only in the 2003-2004 policy, and provides, in pertinent part:

> This insurance does not apply to:
>
> a. "Bodily injury" or "property damage" which would not have occurred in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.
>
> b. Any loss, cost or expenses arising out of the testing for, monitoring, classifying, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi," by any insured or by any other person or entity.

MDCK contends that the 2003-2004 policy, the only policy containing the fungi exclusion, does not apply because the allegedly moldy wood framing was installed in 2001. MDCK asserts that the policies are "occurrence-based" policies, not "claims made policies," so that the policy in effect on the date that "the triggering event or injury happened" is the applicable policy. MDCK does not cite any policy language in support of its assertion that the pertinent date is the date of the cause of the occurrence, rather than the occurrence itself. The policy provides that the insurance "applies to 'bodily injury' and 'property damage' only if . . . [t]he 'bodily injury' or 'property damage' occurs during the policy period[.]" (2003-2004 policy, p 1, Section I(1)(b)(2)). Here, the property damage occurred in 2003, when the house purportedly became uninhabitable because of the mold infestation in the house and in the house's contents. Consequently, the fungi endorsement excludes coverage for any claim by the Feinblooms that their furniture was destroyed or damaged by mold exposure. Thus, there was no duty to defend against these claims.

Hastings also relies on a separate pollution exclusion in its policy. The policy excludes coverage for bodily injury "arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants.'" (2003-2004 policy, p 3, Section I(2)(f)). "Pollutants" is defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." (2003-2004 policy, p 16, Section V(16).) The definition of pollutants is silent with respect to biological substances. The policy does not define "mold."

In *Predeteanu v Auto-Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued September 12, 2006 (Docket No. 267718), this Court analyzed whether an insured's claim for mold damage under a homeowners' policy was included in the policy's coverage for pollution, or excluded under the policy's fungi exclusion. The policy did not define "mold." The policy's definition of "pollutant" was identical to the language in Hastings's policy. *Id.*, slip op at 3. This Court held that mold was not a pollutant, explaining:

> The policy at issue defines "pollutants" as: "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gases and waste. Waste includes materials to be recycled, reconditioned or reclaimed." However, plaintiff does not provide the definition of "mold" and indicate whether or not "mold" can be classified as a "pollutant." Rather, plaintiff concludes that "mold clearly falls within the dictionary definition of a 'contaminant' because 'contaminate' is defined in the dictionary as 'to soil, stain or infect by contact or association.' However, Random House Webster's College Dictionary (2000) defines "mold" as "a growth of minute fungi forming on vegetable or animal matter, commonly as a downy or furry coating, and associated with decay or dampness" or "any of the fungi that produce such a growth; mildew." Thus, "mold" is a "growth of fungi" and growth of fungi is not a listed "pollutant" as defined in the policy. Plaintiff ignores the definition of "mold" completely and rather uses the term "contaminate" without examining whether "mold" qualifies as a "contaminant." Moreover, it should be noted that the policy defines what is included as a pollutant, it does not state that it is "included, but not limited to . . . ." Thus, plaintiff cannot expand the definition of the term "pollutant" to cover items for

which the insurance company did not issue insurance coverage. Accordingly, the trial court correctly granted summary disposition in favor of defendant with regard to claims for mold or pollutant damage.

Hastings's CGL policy is distinguishable from the homeowners policy in *Predeteanu* in that the CGL policy contains exclusions for both fungi and pollutants, whereas the *Predeteanu* policy provided coverage for pollutants, but excluded coverage for fungi. We do not find that this distinction is material to the question whether the pollutant exclusion in the CGL policy excludes coverage for fungi losses. The absence of language including mold specifically, or naturally-occurring biological contaminants generally, in the definition of pollutant, supports MDCK's argument that the Feinblooms' mold damage claim is not excluded by the pollution exclusion.

Hastings also argues that business risks exclusions preclude coverage. These exclusions are contained in Section I(2)(m) and (n) of the policy. Exclusion I(2)(m) provides:

> m. Damage to Impaired Property or Property Not Physically Injured
>
> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work", or
>
> (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
>
> This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

Hastings argues that this exclusion provides an additional basis for denying coverage because "any claims resulting from damage to the residence itself is excluded independent of the fact it is not covered because it is not an occurrence." We disagree. The Feinblooms' claims were predicated on allegations that their property was physically injured because it was infested with mold. An argument could be made that mold growth on furniture does not constitute physical damage because it renders use of the furniture unhealthy and disagreeable without impairing the physical form and structure of the furniture. However, policy exclusions must be strictly construed in favor of the insured. *Pugh*, 294 Mich App at 396. Accordingly, exclusion (m) does not preclude coverage for MDCK.

Exclusion (n) provides:

> n. Recall of Products, Work or Impaired Property
>
> Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product"

(2) "Your work"; or

(3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

Hastings asserts that exclusion (n) "eliminates coverage for any of the claims for costs or expenses resulting from packing/storing property, renting alternative living quarters, etc., because of the claim that there was a dangerous condition (the presence of mold) in the work of Mosher Dolan." We agree. The Feinblooms' claim for costs arising from the need to vacate the uninhabitable residence and find substitute lodging constitute "[d]amages claimed for . . . cost or expense incurred by . . . others for the loss of use of" Hastings's product and work and the Feinblooms' impaired property." The Feinblooms allegedly lost use of the personal property inside their house "because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it." Under this provision, Hastings would not have a duty to indemnify MDCK's losses as excluded by exclusion (n), and therefore would not have a duty to defend because the policy provides that Hastings's duty to defend is coterminous with its duty to indemnify.

Hastings also argues that it is entitled to reimbursement of benefits paid to MDCK because MDCK was unjustly enriched by payment of defense costs for claims when Hastings had no duty to provide a defense. In *Mich Educ Employees Mut Ins Co v Morris*, 460 Mich 180, 197-199; 596 NW2d 142 (1999), our Supreme Court held that an insurer is entitled to the remedy of restitution when its insured (or the insured's conservator, or the insured's children who received survivor's benefits) were unjustly enriched by erroneous payment of benefits. Accordingly, we hold that Hastings does have a right to restitution of erroneously paid benefits.

We hold that the trial court originally erred in denying summary disposition for Hastings. The CGL policies provide that Hastings's duty to defend is coterminous with its duty to indemnify, and it had no duty to indemnify MDCK for any damages to the Feinblooms' personal property because the Feinblooms' claims were excluded by the fungi damage endorsement and exclusion (n).

Accordingly, we reverse the judgment for MDCK and remand of any further proceedings consistent with this opinion. We do not retain jurisdiction.

Saad, P. J. not participating.

/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly